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Supreme Court of the United States

OCTOBER TERM — 1945

No. 579

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent,

against

870 SEVENTH AVENUE CORPORATION, doing business as THE PARK CENTRAL,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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870 SEVENTH AVENUE CORPORATION, doing business as THE PARK CENTRAL,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, 870 Seventh Avenue Corporation, respectfully alleges:

A

Summary Statement of Matter Involved

The petitioner owns and operates The Park Central Hotel in New York City. It seeks review of so much of the judgment of the Court below as permanently enjoins it from increasing the prices which it charges under its so-called "Budget Plan" for meals served in one of its dining rooms known as the Hawaiian Room. The decision below is that the petitioner, in making that increase in prices, violated Section 2 of Restaurant Maximum Price Regulation 2-1, established by the Office of Price Administration under the Emergency Price Control Act of 1942.

That section of the Regulation fixes maximum prices for meals at the highest price at which the meals were *offered* during the period April 4-10, 1943. The prices which the petitioner is enjoined to maintain, however, were never offered or made during the base period or for a long period prior thereto. On the contrary the petitioner *offered* meals in its Hawaiian Room during the base period only at prices considerably in excess of those which it is enjoined to maintain.

The prices so imposed by the judgment below were established by contracts with its Budget Plan tenants in the summer and fall of 1942. It is not disputed that basic food prices and labor costs rose materially in the ensuing months. The Office of Price Administration has itself officially recorded that, in reflection of those increases, restaurant prices also rose during the same period. When, therefore, the Regulation specified the period April 4-10, 1943, as the base period, it was accompanied by a formal statement from the Administrator that that particular period in April 1943 was chosen with the purpose of accommodating the antecedent increase in costs and prices. But obviously the effect of applying the Regulation to the petitioner's situation is to freeze petitioner's prices at the much lower levels contracted for in 1942.

The question here presented is whether the Courts below were correct in holding that the Regulation was nevertheless intended to cover the petitioner's situation. We shall submit in the annexed brief that the many circumstances in its background, the statement of the Price Administrator accompanying it, and its own explicit language, require a different conclusion.

The action was begun on May 23, 1944, with a demand for a temporary injunction (7-15*). Both sides submitted affidavits containing a full statement of the circumstances. There was no question of fact presented with respect to

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* References are to the folios of the Transcript of Record.

the increase of prices in the Hawaiian Room: the petitioner undeniably has sought to make increases in prices in that room; it is now maintaining its legal right to charge increased prices; and it has desisted only because of the injunction below. As the District Court correctly observed, no further evidence would have been elicited on this issue, or any useful purpose served, through a formal trial (340-1). Accordingly, with the consent of the parties, the District Court made a final adjudication of the issue. Its judgment, dated November 21, 1944, finally enjoined the petitioner from increasing its Hawaiian Room prices (359-65). The judgment of the District Court also carried a provision suspending the effectiveness of the injunction upon terms not now material until thirty days following the decision of the Circuit Court of Appeals for the Second Circuit (363).

Other features of the proceeding are not now material. Certain inadvertent violations of specific a la carte prices for specific dishes occurred in defendant's other dining rooms. As the District Court found, any such violations "were not intentional but were due to error. They have since been corrected on all menus and the defendant is in good faith endeavoring to comply with the Regulation" (Finding V, 375). And in the circumstances the District Court declined to grant an injunction.

Both sides served notice of appeal to the Circuit Court of Appeals for the Second Circuit. That Court affirmed the judgment of the District Court in so far as it permanently enjoined any increase of prices in the Hawaiian Room, and the petitioner now seeks a writ of certiorari only in respect of this portion of the judgment.

The Circuit Court of Appeals reversed the judgment in so far as it refused an injunction in respect of petitioner's other dining rooms. It ruled that the District Court should have sought to insure future obedience to the Regulation by some judicial sanction or threat of sanction. It accordingly remanded the proceedings in respect of this branch of the case "with instructions to the District Court

either to grant an injunction or to enter an order retaining the case on the docket with the right of the Administrator, on notice, to renew his application for injunctive relief should violations recur". At the present moment proceedings as to this branch of the case are pending in the District Court upon the application of the Administrator, made September 13, 1945, for a permanent injunction. In view of the largely discretionary nature of the issue, the petitioner does not here seek review on this aspect of the case.

The decision of the Circuit Court of Appeals was rendered August 3, 1945, and its order for mandate is dated August 20, 1945. The opinion has not yet been officially reported.

B

Jurisdiction

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USC, sec. 347). Although this Court is empowered to grant certiorari to review the entire judgment of the Circuit Court of Appeals, the petitioner is limiting its request to the portion of the judgment which affects the Hawaiian Room and which, being final and relating as it does to a distinct portion of the case actually severed from the remainder of the proceeding by the mandate of the Circuit Court, is susceptible of separate review by this Court (*Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362).

C

Statute and Regulations Involved

Immediately involved is Restaurant Maximum Price Regulation 2-1, effective July 19, 1943 (8 F. R. 10436, 12445, 15450). It is set out in full in Appendix 2 to the brief annexed hereto; the sections most relevant are set out *infra*, pages 12-13.

The Restaurant Maximum Price Regulations were promulgated under the authority of the Emergency Price Control Act of 1942, approved January 30, 1942 (Public Law 421, 77th Cong., 2nd sess., 56 Stat. 23). Other allied legislation and Executive Orders are referred to in the annexed brief (pp. 13-19, *infra*).

D

Questions Presented and Reasons Relied on for the Allowance of the Writ

Some years ago the Park Central Hotel in New York City established for a limited number of its rooms, and it offered to the public, leases under a so-called "Budget Plan". The offer, which was for a yearly term at a fixed monthly rental, included a lease of a room or suite in the hotel, laundry and valet service of a stipulated value, and dinner every night for each of the lessees in the Hawaiian Room, one of the hotel's restaurants. A number of such leases were made in the summer and fall of 1942, all to begin on October 1, 1942 and to expire on October 1, 1943. None was made thereafter (179, 379-83, 395).

In July 1943 Restaurant Maximum Price Regulation 2-1 was adopted, by which restaurant prices are limited to the prices at which the meals were offered during the basic period, from April 4 to April 10, 1943. The question here presented is whether the Regulation is now applicable so as to prevent the petitioner from raising the prices charged in its leases made to begin October 1, 1943 or thereafter, above the books prevailing in the leases which were made in the summer and fall of 1942. It is clear that the effort of the plaintiff here is to deprive petitioner of the benefit of the increase in prices which occurred between the summer or fall of 1942 and the base period in April 1943, and which, it may be demonstrated, it was the intention of

the Office of Price Administration to permit restaurant owners to enjoy.

The Regulation, Section 2, provides that the maximum price is "the highest price at which you *offered* the same food item or meal" during the basic period. A study of the history and background of the Regulation will demonstrate that the Courts below have misconceived its intent—for until controls basic to regulation of restaurant prices were established in April 1943, it was recognized as neither fair nor feasible to fix maximum restaurant prices; and only when in April 1943 appropriate basic controls were established by Executive Order did it become fair and feasible to fix maximum prices—and then only at the point to which they had then risen rather than at some earlier level.

The Price Administrator in promulgating the Restaurant Maximum Price Regulation recognized this essential background and specifically declared his intention to have the Regulation so operate as to allow to restaurant owners the benefit of the considerable increase in prices which had occurred in the months before April 1943 (Appendix I, see also p. 19, *infra*).

Analysis of the language of the Regulation itself will further demonstrate that it precisely accommodates that purpose, and that to construe it otherwise, as the Courts below have done, is not merely to do violence to its background and the expressed intent of the Administrator, but also to alter the plain meaning of its text (p. 21, *infra*).

In short, the Regulation has been applied in the present case so as to impose upon the petitioner a price level bargained for and fixed at levels prevailing in the summer and fall of 1942 and not in April 1943—notwithstanding the intervening rise in costs; notwithstanding that all restaurants not bound by contract to the earlier levels made corresponding increases in their prices; and notwithstanding that the petitioner did not after September 1942 *offer* meals upon the basis upon which it is now enjoined to provide them. The Regulation, designed to fix maximum restaurant prices as of April 1943, has been given the

effect in the present case of freezing them as of the summer of 1942. This is contrary to its announced purpose, its history and background, and its explicit language.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue out of this Court to the Circuit Court of Appeals for the Second Circuit requiring that Court to certify and send to this Court a transcript of all the proceedings of the Circuit Court of Appeals for the Second Circuit had in this case; that the order of the Circuit Court of Appeals be reviewed and determined by this Court, and be finally reversed; and that your petitioner be granted such other and further relief as may be proper.

870 SEVENTH AVENUE CORPORATION,
By HENRY COHEN,
Its Counsel.

Dated, October 29, 1945.

Supreme Court of the United States

OCTOBER TERM—1945

No.

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent,

against

870 SEVENTH AVENUE CORPORATION, doing business as THE PARK CENTRAL,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement as to the Facts

The Budget Plan

The petitioner, the Park Central Hotel, one of New York City's largest, has more than 1,500 rooms. Some years ago, experiencing financial difficulties (172, 178-9), it devised a "Budget Plan" lease, applicable to a limited number of its rooms and unique among hotels in New York City. The Plan was attractive to persons who sought escape from the problems of house or apartment living. It was offered for a yearly term at a fixed monthly rental, and it embraced four features (see 172-3):

1) A lease of a room or suite in the hotel for two or more guests;

2) laundry service for each person of a value of $2.50 weekly;

3) valet service for three suits or dresses weekly for each person; and

4) dinner every night for each person in the Hawaiian Room, which is one of the hotel's restaurants.

The 1942 Leases; Not Offered After October 1942

Prices under the Budget Plan were fixed in the summer of 1942 in leases involving 321 of petitioner's rooms. Each of the leases was for a yearly term beginning October 1, 1942. Some of them were signed as early as June 1942 (findings X-XVI, fols. 379 *et seq.*). Most of them were for two-room unfurnished suites. The rentals varied from $125 to $200 or more monthly, depending principally upon the number of persons occupying the suite.

Petitioner made upon its books an allocation of the rental among the different services embraced in the Plan. Where —the typical case—the monthly rental was $150 for two persons, an allocation was made of $90 to rent, $31.84 to meals, and $21.68 to laundry. No separate allocation was made to valet service, the cost of which was borne by the petitioner under a sliding-scale arrangement with a concessionaire (174-5).

The menus in the Hawaiian Room carried no prices, but under the terms of the Budget Plan lease any tenant was privileged to discontinue taking dinner in the Hawaiian Room, and in such event a refund was made of 50 cents for each dinner not taken (177). This refund roughly approximated the amount allocated on the books for the dinners, which obviously were provided at a price materially below either cost or fair value.

In the leasing season for the fall of 1943 the petitioner declined to continue to offer Budget Plan leases upon the terms which had theretofore been offered. This was natural, in the light of the increasing onerousness of those terms upon it with the rapidly rising price structure during the period (see pp. 15-19, *infra*). In fact, the petitioner did not, after the summer of 1942, make any such offer to anyone (179). The District Court found, upon the uncontradicted evidence, that no Budget Plan lease was offered to anyone either during the base period April 4-10, 1943 or for "many months prior" to that period (finding XXXI, fol. 395).

The Only Offer During the Base Period

There was one kind of offer which the petitioner did make, during 1943 and including the base period, of dinners in the Hawaiian Room. Budget Plan tenants had the privilege of bringing their guests into the Hawaiian Room for dinner. One hundred and forty-seven guests were served during the base period. The charge for each such dinner was $1.50. Such was the *only* offer made during the base period, and the District Court so found (*cf.* findings VIII and XXXI, fols. 378, 395).

Price Rises and the 1943 Leases

As stated, the period immediately succeeding the making of the Budget Plan leases in the summer of 1942 was one of rising prices (305). The District Court specifically so found with respect to "basic raw material food costs, as well as labor and other operating costs in the Hawaiian Room" (finding XXX, fol. 395). The Office of Price Administration has given official recognition to the fact that these factors caused an increase in restaurant prices generally in the interval between September 1942 and April 1943 (see pp. 19-20, *infra*). But, because of its outstanding leases, the petitioner was not free to increase its

prices and it did not do so until the leases ended on September 30, 1943.

In the summer of 1943 some of the leases were renewed for the year beginning October 1, 1943. But for the reasons stated the same terms were not offered. The rentals were increased upon a uniform scale: $25 monthly for one occupant, $35 for two, and $45 for three (37-9, 44; findings XXI-XXVII, fols. 388-93). This increase was attributable, and was attributed, to the dinners served to the tenants and not to rental for the suite. All of the increase was so allocated upon petitioner's books (180). The bills rendered monthly to each of the Budget Plan tenants after November 1, 1943 also specifically so allocated the charges between room rental and dinners, and showed all of the increase to be in respect of the dinners * (findings XVIII-XX, fols. 384-8; XXVIII, fols. 393-4). Moreover, the refund for each meal not taken was increased to 75 cents (139).

Still the meals were furnished at a price considerably less than cost. The increase of $35 monthly in the 1943 leases meant only an allocation of $66.84 monthly for the dinners, or approximately $1 each. A fair estimate of the actual cost of the meals would suggest a much higher figure (181 *et seq.*). The menus are in evidence; and other proof shows that the dinners, which the tenants found satisfactory, as their affidavits show, were worth $1.75 to $2 (193-204, 208-13).

In November 1943 the Office of Price Administration made an inquiry in order to determine whether the increase was in violation of the Regulations fixing maximum hotel rentals at March 1943 levels (40-1, 276). No action was taken under those Regulations, doubtless upon the

* Prior to November 1, 1943, the monthly bills were rendered in a lump sum amount. The Rent Regulation for Hotels and Rooming Houses in the New York City Defense Rental Area (sec. 3(e)), effective November 1, 1943, required such specific allocation to be made in the bills rendered.

ground that the increase was in the charge for the dinners and that the Housing or Hotel Regulations do not govern.

The Restaurant Regulation

The present action is therefore brought upon the theory that the increase violates the Regulation covering eating and drinking establishments in New York City—specifically, section 2, Restaurant Maximum Price Regulation No. 2-1—Eating and Drinking Establishments—Food and Drink Sold for Immediate Consumption, effective July 26, 1943 (8 F. R. 10436, 12445, 15450). The Regulation is appended herewith (Appendix II).

The Courts below have endorsed that theory. The District Court issued its injunction permanently restraining the petitioner from charging its Budget Plan tenants any price "beyond that *prevailing* during the base period April 4 to April 10, 1943" (361), and the Circuit Court of Appeals for the Second Circuit has affirmed that determination. The italicized language of the judgment constitutes a significant departure from the text of the Regulation itself, which does not employ that language.

POINT I

The judgment below is contrary to the intent of the Maximum Price Regulation to allow to restaurant owners the benefit of the rise in restaurant prices prior to April, 1943.

Petitioner has been held to have violated section 2 of Restaurant MPR 2-1:

> "SEC. 2. *How you figure maximum prices for food items and meals you offered in the seven-day period from April 4, 1943 to April 10, 1943.* Your maximum price for any food item or meal which you offered in the seven-day period beginning Sunday, April 4, 1943,

and ending Saturday, April 10, 1943, is the highest price at which you offered the same food item or meal in that seven-day period." *

It is important to emphasize the precise text. It fixes the maximum price at "the highest price at which you *offered* the same food item or meal" during the base period. We shall submit that in its choice of the word "offered"—rather than the word "sold", or "charged"—the language used exactly expresses the underlying purpose: to fix prices for food at the levels offered during the base period, and not at the levels contracted for during earlier periods.

The decision below, which freezes petitioner's prices to its Budget Plan tenants in the Hawaiian Room at the levels negotiated in the summer and fall of 1942 *and not thereafter offered,* is not authorized by the Regulation. This may be demonstrated by examination of (a) the history and background of the Regulation; of (b) the official declaration of the Price Administrator accompanying his promulgation of the nationwide Restaurant Regulation; and of (c) the language of the Regulation itself.

A

The History and Background of the Restaurant Maximum Price Regulation

The Emergency Price Control Act of 1942

The immediate history of Restaurant MPR 2-1 begins with the Emergency Price Control Act of 1942, approved

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* The specific prohibition against exceeding maximum prices is in section 1:

"Section 1. *Sales at higher than maximum prices prohibited.* If you own or operate a restaurant, hotel, bar, cafe, club, delicatessen, soda fountain, boarding house, or any other eating or drinking place, you must not offer or sell any 'food item' (including any beverage) or 'meal' at a price higher than the maximum price which you figure according to the directions in the next two sections (sections 2 and 3). You may, of course, sell at lower than maximum prices."

January 30, 1942 (Public Law No. 421, 77th Cong., 2nd sess., 56 Stat. 23).* It vested direct authority in the Price Administrator to establish, by Regulation, maximum prices for all articles, products and materials, whether at manufacturer's, wholesaler's or retailer's levels.† He was enjoined to establish "fair and equitable" prices, and he was specifically directed to take into account increases in costs occurring subsequent to an indicated base period in October, 1941 (sec. 2(a)). As we shall see, he did so when the Restaurant Maximum Price Regulation was announced.

The Emergency Price Control Act left certain obvious gaps in the dikes against inflation. It carried a special provision for agricultural commodities, authorizing maximum prices not less than 110% of parity (sec. 3(a)). It has been authoritatively stated that this provision constituted "a formidable spiralling force, exerting upward pressure" on all prices (*Ginsburg, supra,* at p. 38). Neither did the legislation affect wages or salaries.

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* This was the first statutory attempt at direct control of prices. The Advisory Commission to the Council for National Defense, established May 22, 1940, had maintained a Price Stabilization Division, which did issue price schedules for certain commodities, without, however, any available sanctions (see Ginsburg, *The Price Control Act: Authority & Sanctions,* 9 Law and Contemporary Problems 22-25). The Office of Price Administration and Civilian Supply (OPACS) (6 F. R. 1917), established April 11, 1941, by Executive Order 8734, could allocate priorities and commandeer private property, but again had no direct methods of control over prices.

† "SEC. 4(a). It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under Section 2, or of any price schedule effective in accordance with the provisions of Section 206, or of any regulation order or requirement under Section 202(b) or Section 205(f) or to offer, solicit, attempt, or agree to do any of the foregoing."

The General Maximum Price Regulations; Restaurant Prices Exempted

The General Maximum Price Regulation of April 28, 1942 followed soon after (7 F. R. 3153)—the great overall regulation of prices.

The Act requires the Administrator to issue a "statement of considerations" with every Regulation (sec. 2(a)). In his statement accompanying the General Maximum Regulation, he pointed out that the General Price Maximum Regulation was not a panacea against inflation, but rather served as an indispensable setting for fully effective measures. He referred to certain companion measures necessary to any effective universal price ceiling: control of wages, profits and fiscal policies; an effective war labor policy; and a more stringent income and excess profits tax, plus greatly enhanced savings. He expressed the hope that in the meanwhile the Regulation would serve to end the pressure of labor for higher wages and so enable businessmen to stabilize prices.*

It was recognized however that until adoption of these companion measures, establishment of maximum prices in certain industries would be neither "fair" nor "equitable". Accordingly Supplementary Regulation No. 1, issued simultaneously, created certain exceptions. The restaurant business was one of them. Supplementary Regulation, Art. III, sec. 3.2, subd. (3)(e) declares the General Maximum Price Regulation inapplicable to "sales and delivery by hotels, restaurant * * * and other similar eating establishments, of meals, serving of food portions * * *."

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* Economists were less optimistic, and very early recognized that the measure could not be sufficiently effective. One authoritative study announced that the continuing upward movement in prices was "chiefly due to increases in prices of agricultural products and in wage costs", and that "it is obvious that the Office of Price Administration has no effective control over the price system as a whole" (Jacobstein & Moulton, *Effects of The Defense Program on Prices, Wages and Profits,* The Brookings Institution, September 30, 1941, p. 39, and see generally 41-3; see also Hirsch, *Price Control in the War Economy* (Harper & Bros. 1943), ch. 4, p. 37).

The necessary companion measures were some time in coming.

Wage Stabilization—October 1942

The next step was the Stabilization Act of 1942, approved October 2, 1942 (Public Law No. 729, 77th Cong., 2nd sess., 56 Stat. 265). Food costs were then rising at the rate of 40% annually, and wages at the rate of 1% monthly; a serious inflation was inevitable if more rigid controls were not imposed (Sen. Rep. No. 1609, September 19, 1942, 77th Cong., 2nd sess.).

This legislation made two important strides. It authorized stabilization of wages, salaries and prices (sec. 1), and on October 27, 1942 the Director of Economic Stabilization issued regulations freezing wages and salaries as of specific dates in October, 1942 (Code of Fed. Reg., tit. 32, subchapter A, Chapter XVIII, part 4001; sec. 4001.10). The legislation also reduced the maximum prices of agricultural commodities to parity or the highest price during the preceding nine months, whichever was higher (sec. 3).

Thus certain necessary companion measures to the Emergency Control Act, involving controls over agricultural commodity prices and upon wages and salaries (superimposed upon existing controls of prices and rents) were brought into being. But they failed of effectiveness. The agricultural provisions still strongly tended to inflation; and increases in wage scales were authorized too widely. The "continued rise of the cost of living threatened a new crisis" (5th Quarterly Report of the Office of Price Administration, April 30, 1943, 78th Cong., 1st sess., House Doc. No. 302, pp. 1 and 7). Especially was the rise in food costs disturbing (6th Quarterly Report of the Office of Price Administration, June 30, 1943, 78th Cong., 1st sess., House Doc. No. 358, pp. 7 and 8; see also 4th Quarterly Report, January 31, 1943, pp. 5 and 6).

Under such conditions, no effort was made to fix maximum restaurant prices.

The "Hold the Line" Order, April 8, 1943

The necessary measures were taken by the famous "hold the line" order of the President issued April 8, 1943 (8 F. R. 4681—Executive Order 9328, Supplemental Stabilization Order on Wages, Salaries and Prices). Its effect, bluntly, was to prevent any *further* increases in agricultural commodity prices, and with narrow limitations to freeze wages and salaries except to the extent authorized by the Little Steel formula.*

Restaurant prices had not been subjected to specific controls during the entire period preceding this "hold the line" order of April 8, 1943. The omission was not inadvertent. On the contrary—the Price Administrator stated expressly that regulation of restaurant prices became appropriate only in the light of the conditions first made possible by the "hold the line" Order (p. 19, *infra*). When that Order issued, steps were immediately taken to freeze restaurant prices. But the level was fixed with the purpose of accommodating restaurant price increases occurring prior to the Order.†

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* The order stated in part (78th Cong., 1st sess., Senate Doc. No. 25):

> "The Executive Order I have signed today is a hold-the-line order. To hold the line we cannot tolerate further increases in prices * * *.
>
> * * * * * *
>
> All items affecting the cost of living are to be brought under control. No further price increases are to be sanctioned unless imperatively required by law.
>
> * * * * * * *
>
> Under the Act of October 2, 1942, Congress directed that so far as is practicable, wages, salaries and prices should be stabilized as of the level of September 15. Under that direction inflation has been slowed up. Now we must stop it."

† It was not intended to roll back prices generally. As the President stated in his message accompanying Executive Order 9328: "some prices affecting the cost of living are already above the levels of September 15, 1942. All of these cannot be rolled back." The message states that *only the "excessively high, inequitable or unfair" prices* were to be rolled back, and frozen at levels lower than those reached in the open market in April, 1943.

The first step by the Price Administrator, on April 12, 1943, was his General Order 50, requiring all restaurants to file their menus during the period April 4-10, 1943 (8 F. R. 4808; subd. (a)). This Order gave plain warning of imminent regulations freezing restaurant prices. The Order also delegated the authority to fix maximum restaurant prices to the Regional Price Administrators (subd. (e)).

Every Regional Administrator has promulgated appropriate regulations. Each has specified the base period April 4-10, 1943 (see Appendix 1). The Regulations for New York City, as has already been stated, became effective on July 26, 1943 (see Appendix 2, *infra,* at sec. 24).

On June 29, 1944, the Price Administrator established a uniform nationwide Restaurant Regulation—Restaurant MPR 2. It defines the maximum price in essentially the same language as used in the Regulations of the New York City Regional Director, under which the present action is brought.*

The conclusions from this brief history seem to us inescapable. Because labor costs and the cost of food which is their basic commodity were not then stabilized, restaurants were specifically excepted from the General Maximum Price Regulation which issued in April, 1942. It could not be considered "fair and equitable" to fix restaurant prices until effective controls had been established over both those factors. And since such controls were not established until the "hold the line" order in April, 1943, restaurant price controls were not earlier established. The Regulation was not designed—its history denies such purpose—to impose as maximum prices the prices established by the petitioner in the summer of 1942 *before* these effective basic controls were devised.

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* Section 1(a). *"General rule.* Your ceiling price for any 'meal', 'food item', or 'beverage', except coffee, is the highest price at which you offered the same meal, food item, or beverage between April 4 and 10, 1943."

The Circuit Court of Appeals saw a different purpose in the Regulation: to fix maximum prices at the highest prices "actually *established*" during the base period. Similarly the Court imputed to the Price Administrator an intention to stabilize prices at the level "actually *charged*" during the base period. We find nothing in the background of the Regulation itself which is here reviewed which gives support to any such conclusion. We turn to the statement of the Price Administrator himself.

B

The Price Administrator's Statement

In his statutory Statement of Considerations published with Restaurant MPR 2 on June 29, 1944, the Price Administrator in a few brief paragraphs stated precisely the considerations we emphasize:

> "From the beginning of price control the Office of Price Administration has been cognizant of the ultimate necessity for controlling the prices charged by eating and drinking places. Although the sale of prepared foods by eating and drinking places was exempted when the General Maximum Price Regulation was issued on April 28, 1942, this exemption was founded entirely upon temporary considerations of expediency. *Perhaps the main consideration was the fact that effective control had not yet been devised for the wages and raw food costs which make up the major portion of the expenses which enter into the final price calculations of eating or drinking places.* At the time the exemption was granted it was recognized that the exemption would sooner or later have to be withdrawn and some effective means of restaurant control instituted.
>
> *By April, 1943, controls had been established over raw food and labor costs and at the same time, restaurant prices in general had risen sufficiently to enable operators easily to absorb all intervening cost increases.* This was the situation at the time the President issued Executive Order No. 9328 on April 8, 1943.

> By this Order price control agencies were directed 'to take immediate steps to place ceiling prices on all commodities affecting the costs of living.' Accordingly, on April 12, 1943, the Price Administrator issued General Order No. 50, * * *" (see Appendix 1, p. 28 *et seq., infra*).

The decision below, however, denies to the petitioner the benefits of this underlying purpose "to enable operators easily to absorb all intervening cost increases".

The opinion of the Circuit Court of Appeals refers to the further statement of the Price Administrator that the Price Regulation "is primarily a regulation which freezes the maximum prices of eating and drinking places * * * to the April 4-10, 1943 levels". No one disputes that this is an accurate general description of the effect of the Regulation upon the vast majority of restaurant owners—indeed upon all except the very few in petitioner's unique position. But it is clear that the Price Administrator also had the specific purpose in mind to give restaurant owners the benefit of the increase in prices occurring before April 1943. This general description of a general purpose is hardly to be seized upon as expressive of an intention to override the specific purpose so explicitly recorded.

The Circuit Court recognized that its interpretation of the Regulation results in hardship for the petitioner and it discoursed somewhat philosophically on the economic consequences of wartime regulations while at the same time resisting the suggestion that the Court itself could afford relief. The Court, however, misconceived the petitioner's purpose in pointing out the unfairness, indeed the discriminatory nature, of an interpretation which binds it alone to prices which were fixed in September 1942 or earlier. The petitioner is not asking the Court "to amend general administrative orders". On the contrary, the petitioner's purpose in portraying the background of the Regulation is to show that the interpretation here made of the Regulation inflicts upon restaurant owners the very

hardship which it was the purpose of the Price Administrator to avoid.

The petitioner is seeking an interpretation of the Regulation consistent with the Price Administrator's purpose to spare restaurant owners the hardship which he recognized would result from fixing their prices at levels prevailing before April 1943. To suggest, as did the court below, that the petitioner might apply for relief under section 19 of the Regulation is to beg the question—the Regulation does not bar the increase in petitioner's prices, and there is no need for the petitioner, *defendant* in this action, to seek any affirmative relief.

The Circuit Court of Appeals indicated, however, that in its view the Regulation is so "clear and unambiguous" as in any event to override whatever statement of his purpose the Administrator might have made. We therefore turn to examination of the Regulation itself.

C

The Language of the Regulation

The language employed in the Regulation precisely expresses its purpose to accommodate the rise in restaurant prices during the six months or more preceding the base period.

In defining maximum price, the Regulation employs only the word "*offered*". It limits maximum prices to the highest prices at which the food was "offered" during the base period (pp. 12-13, *supra*). Petitioner did not in April 4-10, 1943 *offer* meals in the Hawaiian Room to its Budget Plan tenants at the prices fixed by the 1942 leases. The Court below explicitly so found (finding XXXI). Yet the judgment compels petitioner to adhere to those prices.

It is not necessary to maintain that the draftsman of the Regulation employed the word "offered" with the conscious and deliberate purpose to exclude the petitioner's situation, even though the Regulation, read literally, has such effect. It is enough that the draftsman did intend to

give to restaurant owners the benefit of the rise in restaurant prices which had occurred in the months prior to the base period in April, 1943, and that his language exactly expresses that intention. The Regulation was not designed to discriminate against the petitioner whose arrangements are unique in the City of New York, and to limit it to prices negotiated on a lower level many months before the base period.

The Administrator had at his command language which, if he had so desired, would have fixed the petitioner's price level at that lower level of 1942. He used such language in other Regulations governing the general price structure. The General Maximum Price Regulation (from which restaurants are excepted) defines the maximum price as "the highest price *charged* by the seller during March 1942" (sec. 2). The purpose underlying that Regulation was to freeze prices for commodities at the price levels then prevailing, regardless of the time when the price was actually fixed—and language was chosen appropriate to achieve that purpose (see pp. 19-20, *supra*). Similarly, the Regulations limiting rentals for Housing, and for Hotels and Rooming Houses, fix maximum rentals at "the rent" on the determinative date (in New York City, March, 1943), regardless of when the rent was fixed.*

Restaurant MPR 2-1 itself draws the distinction which we make. The text of section 1 is that "you must not *offer or sell* any 'food item' * * * or 'meal' at a price higher than the maximum price * * *." It would have been a simple matter for the draftsman, in section 2, similarly to have defined the maximum price as the price for which the petitioner *offered or sold* its meals to its Budget Plan tenants during the base period (or as the price *charged* by the petitioner). The choice, however, to define the

* These Regulations became effective in New York on November 1, 1943. They established March 1, 1943, as the maximum rent date for Housing, and the period February-March, 1943, as the base period for Hotels and Rooming Houses (sec. 4 of each Regulation, 8 F. R. 13910, 13914, Oct. 12, 1943).

maximum price exclusive in terms of "offer" demonstrates the fundamental design to impose only those prices prevailing during the base period which were then freely offered, unembarrassed by contract prices established many months prior.*

The Opinion Below

The Circuit Court nevertheless professes to find in the Regulation "clear and unambiguous terms" fixing ceilings at the highest prices "actually charged" during the base period. It draws a distinction between an offer of a price and an offer of a meal at a price, and it concludes that "the fact that the price for the meals offered was fixed several months before is irrelevant". There may be some dialectical difference between offering a price for meals during a base period and offering meals at a price during that period, but we are unable to understand how that distinction can affect the interpretation of the Regulation.

The District Court did not take this view of the Regulation. Recognizing that the plaintiff's interpretation of the Regulation encounters textual difficulty, it stated that "when one realizes the broad scope that the Regulation must have to be effective it must be apparent that the Regulation does reach out and cover this situation." Of course, this begs the question—*was* the Regulation intended to be so broad in scope? The District Court failed to look to the history of the Regulation for illumination as to its purposes (pp. 13 *et seq.*, *supra*).

The Circuit Court of Appeals appears to have been much influenced by a supposed analogy with the Rent Regulations for Housing, which concededly may so operate as to impose upon landlords rentals "which may have

* Observe how the judgment below overrides the language of the Regulation. The judgment prohibits any charge "beyond that *prevailing* during the base period"; it similarly prohibits any charge for meals "in excess of that *paid* by Budget Plan tenants during the base period" (fol. 361). It (and the findings and conclusions as well) studiously avoids the language of the Regulation.

been fixed by a lease negotiated years in the past". The analogy is, however, imperfect. The Housing Regulations have a different history. They were not issued in response to the "hold the line" order, but have been promulgated in the different defense districts at different times, both before and after April 1943. They were not imposed in New York, for example, until November 1, 1943. Their issuance depended upon other factors than stabilization of costs of food and labor. There is nothing in their history which suggests for a moment that the Price Administrator intended to give to landlords the benefit of any preceding rise in prices. On the contrary, the Rent Regulations always directly rolled back rentals, e.g., an eight months' rollback in New York City. Even the machinery for creating rent controls differed from the Restaurant Regulations—they could not be established until sixty days after the Administrator in that area declared that necessity existed for landlords to stabilize or reduce rents in the particular defense area (Emergency Act of 1942, sec. 2(b))—thus almost necessarily implying a rollback.

The Rent Regulations were plainly designed directly to roll back rentals to levels prevailing upon the day fixed in them as determinative, and the Circuit Court of Appeals could not fairly apply them by analogy.

POINT II

Petitioner's authorized maximum price in the Hawaiian Room under Restaurant MPR 2-1 is $1.50 per dinner.

The petitioner did offer meals in the Hawaiian Room during April 4-10, 1943, as was found below (see p. 10, *supra*). The offer was to guests of tenants; the price was $1.50. The offer was a convenience to tenants, who took their own meals under their leases at a much lower price.

But there is nothing in the text of the Regulation which limits the petitioner to the prices paid by the tenants rather than the prices offered their guests.

The regulation does not require that the price to Budget Plan tenants, or any individual tenant, be no more than they or he personally paid during the base period for their or his dinners.* The Regulation recognizes that different persons might have paid different prices, and on different days during the base period. So far as the text of the Regulation is concerned the owner may charge the highest price offered to anyone during the base period. The Budget Plan tenants had a special privilege by which they paid less, but the Regulation, literally taken, does not recognize any distinction between the Budget Plan tenants and other diners in the Hawaiian Room.

Nevertheless the plaintiff successfully argued below that such a distinction is implicit in the Regulation. Obviously this means not only a separate classification of Budget Plan tenants from other guests in the Hawaiian Room; it would also require each Budget Plan tenant to be placed in a distinct classification, since the allocated food cost varies from tenant to tenant depending upon the total rent charge (pp. 9, 11, *supra*).

We submit again that any such intent to authorize such classifications could easily have been written into this Regulation, as in the case of other Regulations. Classifications are established, for example, in the General Maximum Price Regulation.† Indeed, Restaurant MPR 2-1 itself

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* Sections 1 and 2 of the Regulations (see Appendix 1) provide only that maximum price "is the highest price at which you offered the same food item or meal in that seven-day period."

† Section 2 of the General Maximum Price Regulation expressly states that:

> "For the purposes of this General Maximum Price Regulation the highest price charged by a seller during March, 1942, shall be:
>
> (a) The highest price which the seller charged for a commodity 'delivered' or service 'supplied' by him during March, 1942, to a 'purchase of the same class'."

establishes other types of classification: the kind of meals and services, whether on Sunday or on a weekday or day or evening. But it fails to suggest any classification according to the types of persons served.

The District Court recognized that "the Regulation does not aim to make a distinction between classes of customers" (351). The Court read such classification into the Regulation, however, on the theory (to which we already referred, p. 23, *supra*) that the Regulation must be given a "broad scope" in order to be "effective" (352). But this is a fallacy, as we have fully shown under Point I. There is nothing in its history or its background which warrants reading into it any classification so devised as to roll back petitioner's prices to September 1942 levels.

The Circuit Court of Appeals relied also upon section 9(a)(2) of the Restaurant Regulations, as follows:

> "Sec. 9. *Evasion.* (a) You must not evade the provisions of this regulation by any scheme or device whatsoever. Some, but not all practices which will be regarded as evasive are: * * * (2) Withdrawing the offer, or increasing the price of any meal ticket, weekly rate, or other arrangement by which customers may buy food items or meals at less than the prices they must pay when purchasing by item or meal;"

The Court stated that the petitioner would be evading the Regulation if it increased the prices "for these tenants to that of guests", on the ground that the Administrator "evidently" intended to fix the price of food at the price at which it was sold "under the same arrangement" during the base period.

The Court misconceived the function of section 9. It must be read in the light of section 2—surely its draftsman, in referring to "evasion", did not intend to diverge from the essential definition of maximum price contained in section 2, the price at which the meal was *offered*. Section 9 therefore merely says that if the price for any individual meal is increased beyond the maximum legally

permissible for that meal by increasing the price of an arrangement such as is described, the increase will be regarded as an evasion of the Regulation. But the determination of that legally permissible price must nevertheless be made by reference to section 2 of the Regulation which defines the maximum price as the highest price at which the meals were "offered" during the base period. Otherwise the illustration in section 9 obliterates an essential element from the definition in section 2, carefully drawn though section 2 was.

Similarly, the description in section 9, taken literally and alone, would seem to prevent *any* increase in the price of the arrangement described. If anything is clear, however, it is that the Regulation does not prevent all increases. The prohibition is simply against charging a higher price than the maximum price at which the food was offered during the base period. It does not prohibit any increase in prices, so long as the highest price at which the food was offered during the period is not exceeded. The Court below erred in relying upon the loosely illustrative section 9 without at the same time reading into it the nicely worded definition from section 2.

The same error underlies the ruling of the District Court, which relied on this section 9(a)(2) to buttress its conclusion that the Regulation was intended to have sweeping effect and to embrace plans like the Budget Plan. The maximum price may be ascertained only by reference to section 2, and, as we have argued, that section limits petitioner only to the highest prices at which food was *offered* during the base period in the Hawaiian Room.

Respectfully submitted,

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APPENDIX 1

OFFICE OF PRICE ADMINISTRATION

Statement of the Considerations Involved in the Issuance of Restaurant Maximum Price Regulation No. 2

In the judgment of the Price Administrator it has become necessary and desirable to establish in one regulation, the maximum prices of meals, food items, and beverages sold by eating or drinking establishments for immediate consumption.

The accompanying Regulation is issued in order to eliminate inconsistencies now existing in Regional and District Restaurant Regulations issued under General Order 50, and to achieve uniformity by establishing one national regulation for meals, food items, and beverages based upon what experience has proved to be the best features of the various restaurant regulations now in effect.

The provisions of this Regulation have been submitted to the National Restaurant Industry Advisory Committee. Each section was explained to the Committee which in general approved all the provisions of the Regulation.

Eating and drinking establishments form an essential part of our wartime economy and are directly involved in the cost of living. The public has become increasingly dependent upon them in the course of its every day life. In many defense centers the need for such facilities has been accentuated by tremendous population shifts from outlying areas. Rooming and living facilities in these centers are crowded and overburdened and the opportunities for home preparation of meals are seriously restricted or impaired. Such conditions have thrown an increased burden upon existent restaurant and other eating places. At the same time, material and labor shortages are obstructing or preventing the establishment of new restaurants or

eating places. Moreover, food rationing has limited the supplies available to those places already in existence. These factors have resulted in creating strong pressure for raising the level of prices charged by eating and drinking places.

From the beginning of price control the Office of Price Administration has been cognizant of the ultimate necessity for controlling the prices charged by eating and drinking places. Although the sale of prepared foods by eating and drinking places was exempted when the General Maximum Price Regulation was issued on April 28, 1942, this exemption was founded entirely upon temporary considerations of expediency. Perhaps the main consideration was the fact that effective control had not yet been devised for the wages and raw food costs which make up the major portion of the expenses which enter into the final price calculations of eating or drinking places. At the time the exemption was granted, it was recognized that the exemption would sooner or later have to be withdrawn and some effective means of restaurant control instituted.

By April, 1943, controls had been established over raw food and labor costs and at the same time, restaurant prices in general had risen sufficiently to enable operators easily to absorb all intervening cost increases. This was the situation at the time the President issued Executive Order No. 9328 on April 8, 1943. By this Order price control agencies were directed "to take immediate steps to place ceiling prices on all commodities affecting the costs of living." Accordingly, on April 12, 1943, the Price Administrator issued General Order No. 50, under which eating and drinking establishments were required to file with their respective local War Price and Rationing Boards copies of their menus or price lists for the period of April 4 to 10, 1943. In addition, the order required the keeping or preservation of customary records and future records by the proprietors of eating or drinking places. The order delegated to each Regional Administrator the authority to issue orders establishing maximum prices for meals, food

items, and beverages sold in eating or drinking establishments within his region.

Acting under General Order No. 50, the Regional Administrators and District Directors issued Restaurant Maximum Price Regulations applicable to 90 of the 95 districts of the Office of Price Administration. Data and information collected by these Regional and District Offices have convinced the Administrator of the need for a uniform national regulation based upon the maximum prices charged for meals, food items, and beverages during the base period of April 4-10, 1943—the base period provided for in all of the 32 regulations issued by the Regional Administrators and District Directors of the Office of Price Administration.

The accompanying Regulation, conforming in general to those issued by the Regional Administrators and District Directors, is primarily a regulation which freezes the maximum prices of eating and drinking places in the 48 states and the District of Columbia to the April 4-10, 1943 levels.

Special recognition is given in the accompanying regulation to the practices of the industry in the pricing of holiday meals and seasonal items. Rules have been established for new proprietors which will assure observance of April 4-10 competitive levels.

Although, the provisions of the accompanying Regulation are substantially the same as those found in the Restaurant Maximum Price Regulations issued by the Regional and District Offices, there are certain modifications. In the main these are:

1. The ceiling price for coffee is established at the highest price charged during the seven-day period beginning Sunday, October 4, 1942, and ending Saturday, October 10, 1942. This was believed necessary because, according to all available information, the prices for coffee have been rising unjustifiably in many areas since the institution of a coffee rationing program by the Office of Price Administration in November, 1942.

At that time the ceiling price of coffee was not subject to regulation.

2. The classification of food items, meals and beverages is changed in order to conform to certain trade practices of maintaining price differences depending upon the time of the day or the day of the week.

3. Each District Director is authorized to issue orders requiring eating and drinking establishments to post maximum prices for 40 items in conformity with a specimen posting order appended to the accompanying Regulation. These 40 items are to be selected by each District Director as follows: The District Director will examine a list of suggested meals, food items and beverages suggested by representative members of the trade (District Restaurant Council) in the district and will select 40 items from that list. Each eating and drinking establishment in the district must place on a poster supplied by the district offices as many of the 40 items as it serves. If it does not serve all the 40 items, it must place on the poster as many additional items as are necessary to constitute the total of forty required in the Order with the maximum price for each item. If the establishment serves less than forty items, it must show its complete menu. This posting provision was recommended by the National Restaurant Industry Advisory Committee as a method by which the members of the trade could assist in informing the consumer as to the maximum prices for basic food items in each community. It was also recommended by the Committee as a method of aiding in trade cooperation and compliance with price control.

4. The accompanying Regulation continues the record and filing requirements of General Order 50. It provides that any establishment that failed to comply with the filing provisions of General Order 50, must file with its War Price and Rationing Board within 10 days after the effective date of the Regulation its menus, bills of fare or price lists as

required by the filing provisions of General Order 50. If an establishment fails to comply with this provision, it is prohibited from selling, delivering or offering to sell or deliver the meals, food items, or beverages for which it has not made a proper filing until it has made proper filing with its War Price and Rationing Board.

Issued this 29th day of June 1943.

CHESTER BOWLES,
Administrator.

APPENDIX 2

OFFICE OF PRICE ADMINISTRATION

Maximum Price Regulation 2-1, July 19, 1943

(Document No. 19240)

PART 1448—EATING AND DRINKING ESTABLISHMENTS

[Restaurant MPR 2-1]

FOOD AND DRINK SOLD FOR IMMEDIATE CONSUMPTION

In the judgment of the Regional Administrator of Region II, the prices of food and beverages sold for immediate consumption in the States of New York, New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia, have risen and are threatening further to rise to an extent and in a manner inconsistent with the Emergency Price Control Act of 1942, as amended, and Executive Orders 9250 and 9328.

In the judgment of the Regional Administrator of Region II, the maximum prices established by this regulation are generally fair and equitable and are necessary to check inflation and to effectuate the purposes of the Act. So far as practicable, the Regional Administrator of Region II gave due consideration to prices prevailing between October 1 and 15, 1941, and consulted with the representatives of those affected by this regulation.

A statement of the considerations involved in the issuance of this regulation is issued simultaneously herewith.

Therefore, in accordance with the direction of the President to take action which will stabilize prices affecting the cost of living, and under the authority therewith delegated by the President pursuant to the Act of Congress approved October 2, 1942, entitled "An Act to Aid in Stabilizing the Cost of Living" (F.R. 7565), 77th Congress, Second Session, and under the authority of Executive Order 9250,

Executive Order 9328, and the Emergency Price Control Act of 1942, the Regional Administrator of Region II hereby issues this Restaurant Maximum Price Regulation No. 2-1, establishing, in general, as maximum prices for food and drink sold for immediate consumption in the areas mentioned above the prices prevailing therefor during the seven-day period beginning April 4, 1943, and ending April 10, 1943.

§ 1448.101 *Maximum prices for food and drink sold for immediate consumption.* Under the authority vested in the Regional Administrator of Region II by the Emergency Price Control Act of 1942, as amended, Executive Order 9250, Executive Order 9328, and General Order No. 50 issued by the Office of Price Administration, Restaurant Maximum Price Regulation No. 2-1 (Food and Drink Sold for Immediate Consumption) which is annexed hereto and made a part hereof, is issued.

AUTHORITY: § 1448.101 issued under Pub. Laws 421 and 729, 77th Cong.; E.O. 9250, 7 F.R. 7871; E.O. 9328, 8 F.R. 4681.

RESTAURANT MAXIMUM PRICE REGULATION NO. 2-1—FOOD AND DRINK SOLD FOR IMMEDIATE CONSUMPTION

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SECTION 1. *Sales at higher than maximum prices prohibited.* If you own or operate a restaurant, hotel, bar, cafe, club, delicatessen, soda fountain, boarding house, or any other eating or drinking place, you must not offer or sell any "food item" (including any beverage) or "meal"

at a price higher than the maximum price which you figure according to the directions in the next two sections (sections 2 and 3). You may, of course, sell at lower than maximum prices.

SEC. 2. *How you figure maximum prices for food items and meals you offered in the seven-day period from April 4, 1943 to April 10, 1943.* Your maximum price for any food item or meal which you offered in the seven-day period beginning Sunday, April 4, 1943, and ending Saturday, April 10, 1943, is the highest price at which you offered the same food item or meal in that seven-day period.

SEC. 3. *How you figure maximum prices for food items and meals you did not offer in the seven-day period.* You must figure your maximum price for a food item or meal which you did not offer during the seven-day period as follows:

(a) If you offered the same food item or meal at any time during the four weeks from March 7 to April 3, 1943, inclusive, and if you have adequate records of the prices you then charged, take as your maximum price the highest price at which you offered that food item or meal during that four-week period.

(b) If you did not offer the food item or meal during the five-week period from March 7 to April 10, 1943, inclusive, or if you do not have adequate records of prices charged prior to the seven-day period you must proceed as follows:

(1) Determine the cost of the raw food which you use in preparing the new food item or meal.

(2) From the food items and meals for which you have already established maximum prices, choose a food item or meal which currently has a raw food cost equal to or less than the new food item or meal.

(3) Take as your maximum price for the new food item or meal your maximum price for the food item or meal chosen for comparison. The food item or meal chosen for such comparison should be of the same class as the new food item or meal. (See sections 20 and 21 for definitions and classes of food items and meals). If, however, you have no food item or meal of the same class, you may use for comparison the most similar food item or meal of another class having a food cost equal to or less than your food cost for the new food item or meal. "Currently" as used herein means current on the day you figure your price.

(c) If you are unable to determine a maximum price for a new food item or meal according to paragraphs (a) or (b), then your maximum price is a price which is in line with your maximum prices for other food items or meals in the next higher cost range. A price is "in line" if the customer receives as much value for his money from the one item or meal as from the other. In comparing values, quality, size of portions, and the margin over food cost, are the things that count. A price established under this paragraph must always be lower than the price for the food item or meal used as the basis for computing the "in line" price.

(d) Once your maximum price for a food item or meal has been fixed, it may not be changed, except as provided in section 4.

SEC. 4. *How you figure your prices for seasonal items.* First, determine your maximum price for a "seasonal food item" (defined in section 20 (e)) in accordance with the appropriate rule of sections 2 and 3 of this regulation. Thereafter, this price must be varied in proportion to any seasonal change in the raw food cost of the item: *Provided,* That in no event shall the price be higher than the maximum price as originally determined. If in the past it has been your practice to maintain one price throughout the season, you need not vary your maximum price according

to this rule provided the maximum price was based upon estimated average raw food cost of the item for the entire season.

SEC. 5. *No maximum price for any food item or meal to be higher than the highest maximum price for a food item or meal of the same class offered in the five-week period beginning March 7, 1943, and ending April 10, 1943.* Under no circumstances are you permitted to charge a higher price for a food item or a meal than your highest maximum price for food items or meals of the same class offered in such five-week period.

The provisions of this section shall not apply to seasonal dessert specialties specified in section 21 (a), class 25.

SEC. 6. *Holiday differentials.* Notwithstanding the provisions of the foregoing section, any proprietor who has, customarily, in the regular course of his business, charged higher prices for food items or meals on holidays, such as New Year's Eve, Thanksgiving Day, Labor Day, etc., may continue to maintain his customary differentials.

SEC. 7. *Substitution of food items in meals.* If you have already determined your maximum price for a meal you may substitute for any food item other than the entree (or main dish) in that meal any other food item of the same class without refiguring your maximum price, provided the new food item costs you approximately as much and offers customers about the same value as the food item which it replaces. A meal becomes a "new" meal whenever the entree (or main dish) is changed or a new food item is substituted which costs you less or offers your customers lower value than the food item which it replaces, and you must therefore determine its maximum price in accordance with the rules established by section 3.

SEC. 8. *Prohibition against manipulation of meal offerings.* You must not manipulate your meal offerings in a

manner which will force your customers to spend more for meals than they did during the seven-day period. Among other things you must not

(a) Reduce the number of meals offered at prices equal to or below your "middle price" for meals of the same class served on any day during the seven-day period without making a corresponding reduction in the number of meals offered at prices above that middle price. By "middle price" is meant the price most nearly at the mid-point of your price range for meals of the same class. (Note that Sunday meals and week-day meals are meals of different classes.)

(b) Fail to offer at least as many different meals at (or below) the lowest price charged by you for meals of the same class on any day you select in the seven-day period as you did on that day.

SEC. 9. *Evasion.* (a) You must not evade the provisions of this regulation by any scheme or device whatsoever. Some, but not all practices which will be regarded as evasive are:

(1) Dropping food items from meals, deteriorating quality or reducing quantity without making appropriate reductions in price. For any change in quantity or quality resulting in a cost saving, you shall reduce your maximum price by an amount which is proportionate to the saving in cost. (You must maintain a raw food cost ratio at least equal to such ratio prior to the deterioration or reduction);

(2) Withdrawing the offer, or increasing the price of any meal ticket, weekly rate, or other arrangement by which customers may buy food items or meals at less than the prices they must pay when purchasing by item or meal;

(3) Increasing any cover, minimum, bread-and-butter, service, corkage, entertainment, check-room, parking or other special charges, or increasing any additional charge

for the sale of a food item or meal to be consumed off the premises, or making such charges when they were not in effect in the seven-day period except that a cover or minimum charge in effect during the seven-day period may be increased in accordance with customary practice, where it was the practice to vary the charge in accordance with the type of entertainment offered and the increase does not cause the charge to go above the highest charge made during the last twelve-month period;

(4) Discontinuing a no-tipping practice without a compensating reduction in your maximum prices;

(5) Requiring as a condition of sale of an item or meal the purchase of other items or meals when such condition was not in effect during the seven-day period, except that you may refuse to sell coffee unless a customer also purchases another food item;

(6) Reducing the selection of meals offered at table d'hote prices when the food items which you customarily offered in such meals are being offered at a la carte prices which, when added together, total more than the table d'hote price for the complete meal or give your customers less value for their money.

(b) You will not be considered evading the provisions of this regulation, however, if you do any of the following things, even though you did not do any of these things during the seven-day period:

(1) You may limit your customers to one cup of coffee per meal.

(2) You may limit your customers to one pat of butter per meal.

(3) You may reduce the quantity, or eliminate altogether, condiments (such as catchup, chili sauce, etc.) which you may have customarily placed at the disposal of your customers and which now are, or may hereafter be, subject to any rationing order or rationing regulation of the Office of Price Administration.

(4) You may reduce the amount of sugar served with each cup of coffee or tea, or each bowl of cereal, fruit, or other similar food items with which sugar is served, to, but not less than, one teaspoonful, except that less may be served if your available supply is not adequate.

You may not, however, make the curtailment authorized in the foregoing subparagraphs and furnish the curtailed item at an additional charge. For example, if during the seven-day period you furnished catchup you may not now discontinue furnishing this item free, and at the same time offer to furnish it for an additional charge.

SEC. 10. *Rules for proprietors not in operation during the seven-day period.* (a) If you acquire another's business subsequent to the effective date of this regulation and continue the business in the same place, you are subject to the same maximum prices and duties as the previous proprietor. Prior to acquiring another's business, however, you may apply to your OPA District Office for permission to price under paragraph (b) or (c) of this section. If such permission is granted it may be subject to such conditions as the Office of Price Administration deems necessary.

(b) If you were not in operation during the seven-day period, you must fix maximum prices in line with the maximum prices of the nearest eating or drinking place of the same type as yours. If the maximum prices so fixed are too high and threaten to have an inflationary effect on the price of food or drink, the Office of Price Administration may issue an order requiring you to reduce your maximum prices. You are subject to the record requirements of section 12 and the posting requirements of section 13 immediately upon the opening of your place.

(c) If you cannot price under paragraphs (a) or (b) above, you must apply for a price to your OPA District Office. Your application must be filed ten days prior to the

date you plan to commence operations and present the following information:

(1) Your name and address.

(2) A brief description of your business and the manner of operation.

(3) A list of showing the prices you propose to charge and, if you are a seasonal operator, the prices you charged during your last season.

(4) The date when you plan to commence operations.

(5) The names of two establishments similar to yours.

You may charge the prices listed if they are not disapproved by the Office of Price Administration prior to the date specified for the commencement of operations. That Office may, at any time, after proper investigation and hearing, establish such maximum prices for your business as it deems proper.

SEC. 11. *Taxes.* If in the seven-day period you stated and collected the amount of any tax separately from the price you charged, you may continue to do so. You may also separately state and collect the amount of any new tax or of any increase in the amount of a previous tax on the sale of food or drink or on the business of selling food or drink, if the tax is measured by the number or price of items or meals.

SEC. 12. *Records*—(a) *Filing of menus.* General Order No. 50 required you to file with your war price and rationing board on or before May 1, 1943, a signed copy of each menu or list of your prices in effect during the seven-day period beginning Sunday, April 4, 1943, and ending Saturday, April 10, 1943. If you have not already filed, you must do so immediately. Failure to do so will also constitute a violation of this regulation.

(b) *Filing by proprietors not in operation during the seven-day period.* The proprietor of an eating or drinking place which was not open during the seven-day period (including newly-opened places) shall file menus or a price list in accordance with paragraph (a) above, except that (1) the filing shall be for the seven-day period beginning with the first Sunday that place is open after April 4, 1943 and (2) the filing shall be made within three weeks of such first Sunday.

(c) *Records of the seven-day period.* You must make available for examination by any person during ordinary business hours a copy of each menu used by you in the seven-day period from April 4-10, 1943, or if you are a new proprietor, in the seven-day period referred to in paragraph (b) above. If you did not use menus, or if your menus were incomplete, you must make available for such examination a list of the highest prices you charged in such seven-day period.

(d) *Customary records.* You must preserve all your existing records relating to your prices, costs and sales. You must also continue to maintain such records as you ordinarily kept. All such records shall be subject to examination by the Office of Price Administration.

(e) *Future records.* Beginning with the effective date of this regulation, you must keep, for examination by the Office of Price Administration, two copies of each menu used by you each day. If you do not use menus you must prepare, in duplicate, and preserve for such examination, a record of the prices charged by you each day, except that you need not record prices which are the same as, or less than, prices you previously recorded for the same items or meals. Proprietors who operate a number of eating or drinking places in the same city which have customarily been subject to central control may keep the records required by this paragraph for those places at a central office or the principal place of business within the city.

SEC. 13. *Posting.* (a) Beginning August 2, 1943, each menu must have clearly and plainly written on or attached to it the following statement:

All prices are our ceiling prices, or below. By OPA regulation, our ceilings are based on our highest prices from April 4 to 10, 1943. Our menus or price lists for that week are available for your inspection.[1]

If you do not use menus, you must post the above statement at a place where it can easily be read by your customers.

(b) If you do not use menus, you must post your prices for food items and meals currently offered by you at a place or places where they can easily be read by your customers.

SEC. 14. *Operation of several places.* If you own or operate more than one eating or drinking place, you must do everything required by this regulation for each place separately.

SEC. 15. *Relation to other maximum price regulations.* The provisions of this regulation shall supersede other regulations, including the General Maximum Price Regulation, now or hereafter issued by the Office of Price Administration, insofar as they establish maximum prices for meals and food items sold by eating and drinking places. However, a price charged during the seven-day period of this regulation shall not become a maximum price under this regulation if it exceeded the maximum price established by another regulation applicable at that time. In such case the lawful maximum price applicable at that time shall be the maximum price hereunder.

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[1] If you were not in operation during the seven-day period from April 4 to April 10, 1943, substitute the following statement:

"All prices are our ceiling prices, or below. By OPA regulation, our ceilings as a new proprietor are in line with competitive prices from April 4 to 10, 1943. Our menus or price lists for our first week of operation are available for your inspection."

SEC. 16. *Geographical application.* This Restaurant Maximum Price Regulation No. 2-1 applies to the States of New York, New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia.

SEC. 17. *Enforcement.* Persons violating any provisions of this regulation are subject to the criminal penalties, civil enforcement actions, suits for treble damages and proceedings for suspension of licenses, provided for by the Emergency Price Control Act of 1942, as amended.

SEC. 18. *Exempt sales.* Sales by the following eating or drinking places are specifically exempt from the provisions of this regulation:

(a) Eating and drinking places operated in connection with special church, Sunday school and other religious occasions.

(b) Hospitals, except for food items and meals served to persons other than the patients when a separate charge is made for such food items and meals.

(c) Eating and drinking places located on broad common carriers (when operated as such), including railroad dining cars, clubs, bar and buffet cars, and peddlers aboard railroad cars traveling from station to station.

SEC. 19. *Adjustments.* (a) The Office of Price Administration may adjust the maximum prices for any eating establishment under the following circumstances:

(1) The establishment is operating under such hardship as to cause a substantial threat to the continuance of its operations.

(2) It is determined with reasonable certainty that such discontinuance will result in serious inconvenience to consumers in that they will either be deprived of all restaurant service or will have to turn to other establishments that

present substantial difficulties as to distance, hours of service, selection of meals or food items offered, capacity, or transportation; and

(3) By reason of such discontinuance, the same meals or food items will cost the customers of the eating establishment as much as or more than the proposed adjusted prices.

(b) If you are the proprietor of an eating establishment which satisfies the requirements specified above, you may apply for an adjustment of your maximum prices by submitting to your OPA District Office a statement setting forth:

(1) Your name and address.

(2) A description of your eating establishment including: type of service rendered (such as cafeteria, table service, etc.), classes of meals offered (such as breakfast, lunch and dinner), number of persons served per day during the most recent thirty-day period,[2] and such other information that may be useful in classifying your establishment.

(3) The reasons why your customers will be seriously inconvenienced if you discontinue operations.

(4) The names and addresses of the three nearest eating places of the same type as yours.

(5) A list showing your present maximum prices and your requested, adjusted prices.

(6) A profit and loss statement for your restaurant business for the most recent three-month accounting period, and a copy of your last income tax return if one was filed separately for your restaurant business.

Applications for adjustment under this section may be acted upon by any district office that has been authorized to do so by order of the Regional Administrator.

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[2] In counting the number of persons served, anyone who was served more than once is to be counted separately for each occasion he was served.

SEC. 20. *Definitions and explanations.* (a) "Person" means individual, corporation, partnership, association or other organized group of persons or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, any other government, or any of its political subdivisions, and any agencies of any of the foregoing.

(b) "Meal" means a combination of food items sold at a single price. Examples of meals are a five-course dinner, a club breakfast, and a blue-plate special. Two or more kinds of food which are prepared or served to be eaten together as one dish are not a "meal". Examples of such dishes are: ham and eggs, bread and butter, apple pie and cheese. See section 21B for "classes of meals".

(c) "Offered" means offered for sale for consumption in or about the eating or drinking place, and includes the listing or posting of prices for items and meals even though the items and meals so offered were not actually on hand to be sold.

(d) "Food item" means an article or portion of food (including beverages) sold or served by an eating or drinking place for consumption in or about the place or to be taken out for eating without change in form or additional preparation. It includes two or more kinds of food which are prepared or served to be eaten together as one dish, such as ham and eggs, bread and butter, apple pie and cheese.

Food items, otherwise identical, are not the same for the purpose of establishing maximum prices under sections 2 and 3, when they are items in different classes. (See section 21 (a) for "classes of food items".) For example: lamb chops offered a la carte for dinner or lunch are in class 13 while if offered for breakfast, they are in class 4.

(e) "Seasonal food item" means a food item (including beverage) not generally offered for sale throughout the year and normally available in quantity only during certain

seasonal production periods of each year. Examples are: certain shell-fish such as oysters; certain fresh fish such as salmon, trout and shad; certain vegetables such as summer squash; and certain fruits such as berries and melons.

(f) Unless the context otherwise requires, the definitions set forth in section 302 of the Emergency Price Control Act of 1942 and in the General Maximum Price Regulation, issued by the Office of Price Administration, shall apply to other terms used herein.

SEC. 21. *Classes of food items and meals.* (See definition of "food item" and "meal" contained in section 20.)

(a) *The classes of food items.* For the purposes of this regulation there shall be thirty-six classes of food items:

BREAKFAST ITEMS

1. Fruits, fruit juices and vegetable juices.

2. Cereals.

3. Entrees: egg and combination egg dishes served at breakfast.

4. Entrees: meat and meat combination dishes served at breakfast.

5. Entrees: all other dishes served at breakfast.

6. Breads, rolls, buns, danish-pastries, etc., served at breakfast.

7. All other breakfast dishes including jams, jellies, and preserves.

Other Items

8. Appetizers, except alcoholic cocktails.

9. Soups, including soups in jelly.

10. Beef: steaks and roasts.

11. Veal: steaks, chops, and roasts.

12. Pork: loin, chops, steaks, roasts.

13. Lamb or mutton: chops, roasts.

14. Poultry and fowl.

15. Fish and shell-fish.

16. Game.

17. Miscellaneous and variety meats, including liver and kidneys.

18. Prepared dishes such as stews, casseroles, ragouts, curries, etc.

19. Egg and cheese dishes and combinations thereof.

20. All other dishes such as spaghetti and combinations, vegetable platter, baked beans and combinations, chop suey, etc.

21. Vegetables, including potatoes.

22. Salads (except as served as a main course or appetizer course in a meal).

23. Desserts: cakes, cookies, pies, pastries, and other baked goods.

24. Desserts: ice creams, sherbets, water ices, including combinations with syrups, creams, fruits and nuts.

25. Desserts: seasonal dessert specialties such as watermelon and cantaloupe.

26. Desserts: all others, including fruits, pudding and cheese.

27. Cold sandwiches: including garnishings, salads and vegetables.

28. Hot sandwiches: including garnishings, salads and vegetables.

29. All other food items served in a meal including mints and preserves.

30. Beverage foods, including coffee, cocoa, chocolate, tea and milk.

BEVERAGES

31. Non-alcoholic beverages, including sparkling and mineral waters.

32. Alcoholic malt beverages, including beer and ale.

33. Wines, including sparkling wines.

34. Liquors, including whiskeys, gins and brandies.

35. Cordials, including fruit liqueurs.

36. All other alcoholic beverages.

(b) *The classes of meals.* For purposes of this regulation there shall be thirteen classes of meals, namely: breakfast, lunch, tea, dinner and supper during week days, and breakfast, lunch, tea, dinner and supper on Sundays, children's breakfast, lunch and dinner.

SEC. 22. *Special orders.* The provisions of this regulation to the contrary notwithstanding, the Office of Price Administration may from time to time issue special orders providing for the establishment or reduction of the maximum price of any food item or items or meal or meals sold or offered by any seller or sellers when, in the judgment of the Regional Administrator, such action is necessary or desirable to prevent inflation, to stabilize prices affecting the cost of living, or to carry out the purposes of the Emergency Price Control Act of 1942, as amended, and Executive Orders Nos. 9250 and 9328.

SEC. 23. *Licensing.* The licensing and registration provisions of sections 15 and 16 of the General Maximum Price Regulation shall apply to every person making sales subject to this regulation. Sections 15 and 16 provide, in brief, that a license is required of all persons selling at retail commodities for which maximum prices are established. A license is automatically granted. It is not necessary to apply for the license, but all sellers may later be required to register. The license may be suspended for violations in connection with the sale of any commodity for which maximum prices are established. No person whose license is suspended may sell any such commodity during the period of suspension.

SEC. 24. *Revocation and amendment.* (a) This regulation may be revoked, amended or corrected at any time.

(b) You may petition for an amendment of any provision of this regulation (including a petition pursuant to Supplementary Order No. 28) by proceeding in accordance with Revised Procedural Regulation No. 1, except that the petition shall be filed with and acted upon by the Regional Administrator.

This regulation shall become effective July 26, 1943.

NOTE: The reporting and record-keeping requirements of this regulation have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

(Pub. Laws 421 and 729, 77th Cong.; E.O. 9250, 7 F.R. 7871.)

Issued this 19th day of July 1943.

SYLVAN L. JOSEPH,
Regional Administrator.

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675142—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 579

870 SEVENTH AVENUE CORPORATION, DOING BUSINESS AS THE PARK CENTRAL, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 113–120) is not reported. The findings of fact and conclusions of law appear at pages 123–133 of the Record. The opinion of the Circuit Court of Appeals (R. 138–145) is reported in 150 F. (2d) 819.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 3, 1945 (R. 145). The petition for a writ of certiorari was filed on No-

vember 3, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE AND REGULATIONS INVOLVED

Section 205 (a) of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 640; 50 U. S. C. App., Supp. IV, 925 (a)) reads as follows:

> (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Restaurant Maximum Price Regulation No. 2–1 (8 F. R. 10436, 12445, 15450) is set forth in the Appendix to Petitioner's Brief at pages 33 to 51.[1]

[1] Restaurant Maximum Price Regulation No. 2 (9 F. R. 7263) had superseded Restaurant M. P. R. No. 2–1 at the time the judgment was entered by the district court. R. M. P. R. No. 2, issued by the Administrator primarily for the purpose of achieving nationwide uniformity in restaurant price control, contains all of the substantial provisions of R. M. P. R. No. 2–1 that are material to the case at bar. The Administrator's Statement of Considerations for the issuance of R. M. P. R. No. 2 are set forth in the Appendix to Petitioner's Brief at pages 28 to 32.

STATEMENT

Petitioner owns and operates the Park Central Hotel in New York City and maintains therein five separate restaurants, one of which is called the Hawaiian Room. Prior to and between April 4 and April 10, 1943, and subsequent thereto, petitioner rented certain suites in its hotel under Budget Plan leases which entitled the tenants to the occupancy of their respective suites, and in addition thereto, dinner nightly in the Hawaiian Room, laundry services not exceeding $2.50 per week for each person, and valet services consisting of the pressing of not more than three suits or dresses for each person in one week (R. 126). Between October 1, 1942, and November 1, 1943, tenants were billed a flat sum each month without indication of the various amounts allocated to rental, meals, and other services, but such allocation was made on the petitioner's books (R. 128–129). The dinners in the Hawaiian Room were served from a menu which carried no prices after the food items (R. 125–126). In a typical case of a total monthly charge of $150, $90 was allocated to rent, $21.66 to laundry for two persons, and $38.34 to meals and valet services (R. 129). During the same period petitioner made a charge of $1.50 for each meal taken in the Hawaiian Room by a guest of a Budget Plan tenant (R. 126).

Under date of July 19, 1943, the Regional Price Administrator of Region II, acting under the pro-

visions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 640; 50 U. S. C. App., Supp. IV, 901–946) and under a general order of the Price Administrator, issued Restaurant Maximum Price Regulation No. 2–1, effective July 26, 1943, and applicable to the states of New York, New Jersey, Pennsylvania, Delaware, and Maryland, and to the District of Columbia. Section 1 of that regulation provided that a restaurant or hotel owner "must not offer or sell" any meal or food item at a price higher than the maximum price established in either Section 2 or 3 thereof. Section 2 provided that "your maximum price for any food item or meal * * * is the highest price at which you offered the same food item or meal" during the seven-day period April 4–10, 1943.

On or about June 2, 1943, and at various times thereafter, petitioner renewed various Budget Plan leases at rentals higher than those previously charged. Typical cases of increases on the various suites were as follows (R. 15):

(a) two-room unfurnished suites occupied by one person were increased from $125 to $150 per month;

(b) two-room unfurnished suites occupied by two persons were increased from $150 to $185 per month;

(c) two-room unfurnished suites occupied by three persons were increased from $175 to $220 per month.

Petitioner concedes that these increases were for meals served by it in the Hawaiian Room (Pet. p. 3).

Subsequent to November, 1943, when the O. P. A. Rent Regulations became effective, the additional amounts charged under the renewed leases were allocated to meals, laundry, and valet service on the bills submitted to the tenants by petitioner (R. 129–130).

After a conference on January 17, 1944, between representatives of the petitioner and representatives of the Office of Price Administration, the petitioner was advised that the increases in the prices of meals served in the Hawaiian Room constituted violations of M. P. R. No. 2–1, and was requested to reduce them to the amounts charged during the base period established by that regulation (R. 17). The petitioner having failed to reduce its prices, the Price Administrator instituted this suit in the United States District Court for the Southern District of New York under the provisions of Section 205 (a) of the Emergency Price Control Act, *supra,* to enjoin the petitioner from continuing to violate that Act and the regulation issued thereunder (R. 3–5). The district court concluded that petitioner's price increases were violations of the regulation, but withheld issuance of the injunction for thirty days to give petitioner an opportunity to cease the violations and to make proper adjustments with its

tenants (R. 113–120). Subsequently, the district court permanently enjoined the petitioner from selling or delivering food for immediate consumption to the Budget Plan tenants at prices in excess of the maximum prices provided for by Restaurant Maximum Price Regulation No. 2–1, as amended, unless the petitioner should stipulate its intention to abide by the court's determination, and should within thirty days make adjustments with its tenants for the excessive amounts theretofore collected by it (R. 121). On appeal the circuit court of appeals affirmed the judgment of the district court with respect to the violations in the Hawaiian Room[2] (R. 138–143).

QUESTION PRESENTED

Whether petitioner violated the applicable maximum price regulation in increasing the amount charged its Budget Plan tenants for meals in the Hawaiian Room over the prices which it

[2] The Administrator also brought suit to enjoin violations in petitioner's four other restaurants. The District Court thought an injunction was unnecessary as to these restaurants and dismissed the complaint. The circuit court of appeals, upon appeal by the Administrator from this portion of the judgment, reversed and remanded the proceedings with instructions to grant an injunction or to enter an order retaining the case on the docket with the right of the Administrator, on notice, to renew his application for injunctive relief should violations occur (R. 144–145). Petitioner seeks no review of this portion of the order of the circuit court of appeals, and this branch of the case is not involved in the petition (Pet. p. 3).

charged these tenants during the period from April 4 to April 11, 1943.

ARGUMENT

I

Section 1 of Restaurant M. P. R. No. 2–1 provided that a restaurant or hotel owner "must not offer or sell" any meal or food item at a price higher than the maximum price. Section 2 of that regulation provided that the maximum price for any food item or meal should be the highest price at which the same food item or meal was "offered" during the base period, April 4–10, 1943.

Petitioner contends that it made no "offer" within the meaning of the regulation during the week of April 4–10, 1943 with respect to meals served to Budget Plan tenants in the Hawaiian Room, but that the offer to those tenants was made several months prior to the base period when the tenants entered into their respective leases.[3]

It is not only unrealistic to argue that meals prepared, served, and consumed during the period

[3] The district court did not, as petitioner states in its brief at page 21, "explicitly" or otherwise find that petitioner did not in April 4–10, 1943, *offer meals* in the Hawaiian Room to its Budget Plan tenants at the prices fixed by the 1942 leases. The court found only that "All of the Budget Plan leases in effect during the base period had been made many months prior to April 1, 1943, and none [of the leases] was offered or entered into during the base period" (R. 132, Finding of Fact XXXI).

April 4–10, 1943, were offered at a previous time when the leases were made, but the contention also appears to be inconsistent with the intention of the Congress as plainly stated in Section 4 (a) of the Emergency Price Control Act (56 Stat. 23; 50 U. S. C. App., Supp. IV, 904 (a). That Section provides that "it shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver a commodity, * * * in violation of any regulation or order * * * or to offer, solicit, attempt, or agree to do any of the foregoing." Petitioner endeavors to support its contention by pointing out that Section 1 of the regulation contains the words "offer to sell," whereas Section 2 of the regulation uses only the word "offered." The use of the term "offered" was merely responsive to the special needs and conditions prevailing in the restaurant trade. Most business firms are in a position to prove actual selling prices during a base period by means of bills and invoices. Restaurants, however, find it easier to rely on the offering price shown in their menus used during the base period. Hence, the regulation involved was drafted so as to permit restaurant owners to refer to offering prices during the base period, while persons in other kinds of business, subject to the General Maximum Price Regulation (the general "freeze" regulation), were per-

mitted to use their offering prices only in the event that they had not made an actual delivery of the commodity during the base period. It was the purpose of Restaurant M. P. R. No. 2–1 to freeze all current and future prices at the levels which prevailed during the base period. In the light of the above considerations, it is plain that the administrator had no intention of creating any distinction such as is drawn by the petitioner from the omission of the word "sell" from Section 2 of the regulation. Thus, Section 2 must be read in conjunction with Section 1 and not in contradistinction to it. Section 1 prohibits the offer or sale of any food item at a price higher than the maximum price computed according to "directions" contained in Sections 2 or 3. The direction in Section 2 is express that the restaurant must figure maximum prices for meals at the highest price "at which" they were "offered" in the base period; not at the highest price at which a contract to provide such meals was entered into. As was well stated by the circuit court of appeals:

> * * * the fact that the price for the meals offered was fixed several months before is irrelevant. That price, just as the rate of rental received pursuant to a lease entered into some months before the Rent Regulations became effective, did not depend upon the time when the contract to provide meals at that price was entered

> into. Section MPR No. 2–1 fixed price ceilings at the highest prices actually established during the week of April 4–10, 1943, regardless of whether these prices were established by prior contract or otherwise. (R. 140.)

Petitioner further argues that the interpretation placed on the regulation by the court below is discriminatory and results in hardship to it, in that it deprives petitioner of the benefits of the increases in prices which occurred prior to April 1943. On this point, the petitioner relies upon the Price Administrator's Statement of Considerations which accompanied Restaurant M. P. R. No. 2 (Pet. App., pp. 28–32) to show that the Administrator did not intend the regulation to deprive any restaurant owner of the benefits of the increases in prices which occurred prior to April 1943. The Statement of Considerations declares also, that data and information collected by the Regional and District offices "have convinced the Administrator of the need for a uniform national regulation based upon the maximum prices charged for meals, food items, and beverages during the base period of April 4–10, 1943 * * *," and that "The accompanying Regulation * * * is primarily a regulation which freezes the maximum prices of eating and drinking places in the 48 states * * * to the April 4–10, 1943 levels" (Pet. App., p. 30).

We submit that it was the broad purpose of the Administrator in adopting the regulation to fix the maximum prices for meals at the April 4–10, 1943, levels, regardless of existing leases or contracts in particular cases.

If the regulation worked a substantial hardship on petitioner, it had ample opportunity to file a protest under Section 19 of the regulation, and then obtain judicial review by appeal to the Emergency Court of Appeals under Section 204 of the Act should the protest be denied. *Yakus v. United States,* 321 U. S. 414; *Bowles* v. *Seminole Rock and Sand Co.,* No. 914, October Term, 1944, decided June 4, 1945. Questions involving the equity and fairness of price schedules are matters placed exclusively within the jurisdiction of the Emergency Court of Appeals. *Bowles* v. *Nu Way Laundry Co.,* 144 F. (2d) 741 (C. C. A. 10th), certiorari denied, 323 U. S. 791. Thus, the court below was correct in declining to grant the petitioner relief from the hardship of the regulation[4] (R. 141).

[4] In any event, even if petitioner's assertion were adopted that the tenants' meals were not "offered" during the base period, the maximum price for the meals served to them should have been determined in accordance with the procedure set forth in Section 3 (b) of the Regulation, which provides for the calculation of maximum prices for those food items or meals which were not offered during the base period or the four weeks preceding it. Since petitioner evidently did not use that method of calculation, it was in violation no matter how its conduct is viewed.

II

Petitioner next contends that the price, $1.50, which it charged for each meal served in the Hawaiian Room to the guests of its Budget Plan tenants, became the ceiling price for meals served to the Budget Plan tenants themselves, and that there was, therefore, no violation, because the increased prices charged to the tenants did not exceed the $1.50 rates charged for the guest meals. Both the district court (R. 118) and the circuit court of appeals (R. 142) rejected this contention, holding that to sustain it would contravene Section 9 (2) of the regulation, which defined the practices that would be regarded as evasions of the regulation to include:

> (2) Withdrawing the offer, or increasing the price of any meal ticket, weekly rate, or other arrangement by which customers may buy food items or meals at less than the prices they must pay when purchasing by item or meal.

The circuit court of appeals also expressed the opinion that the regulation "was intended to fix the price of food to that at which it was sold under the same arrangements during the critical period" (R. 142). This view is manifestly sound. It is true, of course, that the regulation contains a classified list of food items, while it does not expressly designate classes of customers. This, however, does not overcome the language con-

tained in Section 9 (2) which provides that increasing the price of any "meal ticket [or] weekly rate" shall be regarded as an evasion of the regulation. This language, used in the particular setting, makes it plain that the regulation recognized that there were different classes of restaurant customers, and that the maximum prices established by the regulation should be fixed in accordance with the respective categories. Classifications of this kind in connection with price control regulations are essential in order to effectuate the purposes of the Emergency Price Control Act. Cf. *Bowles* v. *Nu Way Laundry Co., supra,* and *Rainbow Dyeing & Cleaning Co., Inc.,* 150 F. (2d) 273 (App. D. C.). Consequently, the regulation here involved must have been designed by the Administrator to enable restaurant customers to continue to obtain equivalent meals at the same prices paid by them under the same circumstances during the base period. To reach a contrary conclusion would require the court to indulge in the presumption that the Administrator, when adopting the regulation, did not intend to prevent substantial increases in the cost of living such as are involved here, although the prevention of inflation was the primary purpose of the Act which he was administering.

Considered in the light of the broad purposes of the Emergency Price Control Act and the substantial price increases which occurred in this

case, the construction placed on the regulation by the courts below is, we submit, reasonable and proper.

CONCLUSION

The decision of the court below is clearly correct, and there are no conflicts of decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JOHN R. BENNEY,
Attorney, Department of Justice.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

MILTON KLEIN,
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